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No. 96-1740

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GESKE & SONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

GERARD C. SMETANA*
LAW OFFICES OF
GERARD C. SMETANA
38 South La Salle Street, Suite 1218
Chicago, Illinois 60603
(312) 357-0250

MICHAEL E. AVAKIAN
CENTER ON NATIONAL
LABOR POLICY, INC.
5211 Port Royal Road, Suite 103
No. Springfield, VA 22151
(703) 321-9180
**Counsel of Record*

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No. 97-1740

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GESKE & SONS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioner Geske & Sons, Inc. ("Geske") respectfully submits this reply to the brief of the respondent National Labor Relations Board ("NLRB" or "Board") in opposition to Geske's petition.

I.
DENIAL OF THE PETITION WILL UNDERMINE CAREFULLY CONSTRUCTED PROTECTION FOR THE RIGHT TO REDRESS GRIEVANCES IN DISREGARD OF THE COURT'S DECISIONS IN *BILL JOHNSON'S RESTAURANTS* AND *LECHMERE, INC.*

The Board unquestionably had the burden to demonstrate it assumed jurisdiction over the state lawsuit in a manner that 1) did "not deprive a litigant of his right to have genuine state law legal questions decided by the state judiciary," *Bill Johnson's Restaurants*

v. NLRB, 461 U.S. 731, 746 (1983), or 2) intervene "if there is *any realistic chance* that the plaintiff's legal theory might be adopted," unless the theory "is plainly foreclosed as a matter of law or is otherwise frivolous." *Id.* at 747. The General Counsel's opposition demonstrates that the Board has developed a new mechanism for evaluating cases of this kind and has bypassed the considerations carefully laid down by the Court. The Board's opposition is based on its newly stated legal position that Geske "was unlikely to succeed on its trade libel claim." Opp. at 7.

The new test articulated here is not used by the Board in the instant case or in accordance with this Court's directions in *Bill Johnson's Restaurants, Inc.*. As in *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438, 444 (1965), where counsel for the Board articulates a rationale for the Board's Order that the Board itself had not explained, the Court rejected the *post hoc* argument: "[f]or reviewing court's to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review."[1]

The General Counsel's opposition goes further and asserts that Geske has not claimed that the union's underlying activities were not "protected by the Act." Opp. at 7. Geske filed unfair labor practice charges with the General Counsel on August 31, 1991, App. 55a, alleging that these activities violated the Act. The General Counsel dismissed most of those charges without a hearing. Hence, the question whether the union's actions were lawful is not properly raised by the General Counsel. *NLRB v. United Food & Comm. Workers Union, Local 23*, 484 U.S. 112 (1987).[2]

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[1]"It is well settled that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfg's Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

[2]The General Counsel states that Geske does not seek review of the related question of intent to retaliate against protected union activity. Rep. at 7. The Questions Presented fairly comprise the twin aspects of Board error in

(continued...)

On the contention that review is not merited on the claim of error by Geske that its case "was not 'based on intentional falsehoods or knowingly false claims,'" Opp. at 7, the quote objected to by the Board is this Court's actual language in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 743, setting the standard for review under the NLRA. Pet. at 11.

On the contention that Petitioner "was unlikely to succeed on its trade libel claim" because the language of the picket signs "was not in dispute," Opp. at 7-8, the Board focuses solely on the printed words and not the conduct and statements of the business agents to customers for which the signs displayed the union's misuse of the words "on strike." Geske's first and amended complaints corroborated the oral misstatements and untruthful conduct of union business agents with the misuse of the signs. The Board does not contest Geske's fundamental Illinois trade libel argument that the union's conduct and statements to customers, noted by the ALJ (but not resolved in her opinion), present genuine issues of fact that Geske had every reason to believe the signs could support. App. at 57a.

The argument that "every court" involved with this case has concluded that Petitioner "had no realistic chance of success on the merits," is also not correct. Opp. at 8. Since *no court* or *the Board* ever articulated and applied the "realistic chance" test that the Board for the first time recognizes here is the right test, the observation is not supportable. Moreover, the Illinois court decisions reprinted in the Appendix to the Petition (as argued in the Petition at 18 n. 15), never made a determination of the merits of Geske's case. The long line of Illinois cases reflected in Illinois Supreme Court Rule 307(a)-(1) of appellate procedure, that interlocutory appeal decisions "may not be used as a vehicle to determine the merits of a plaintiff's case," is unanswered by the Board, as well as Rule 23 that Geske's case not be cited as precedent. 113a.

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[2](...continued)
finding an unfair labor practice. Geske's Petition explained the two prongs of credibility and state law that were improperly decided. Moreover, this issue is within Supreme Court Rule 14.1(a): "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein."

How the state court renders judgment is critical to *Bill Johnson's Restaurants*. The Court stated that "the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted." *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 747. Since the state court has allowed successive amendments to the pleadings, it is unlikely it would have done so if Geske's amendments were futile.

On the Board's opposition that the decision below does not conflict with the Third, Fifth, and Ninth Circuits that applied the antitrust "sham" principle of "no realistic chance of success on the merits" to labor cases arising in their Circuits, because "[t]hat is merely another way of articulating the *standard applied by the Board* and the court of appeals here," Opp. at 8 (emphasis added), the Board points to no principle or standard that it applied at all. Not one sentence in the Board's decision applies that test or a related one. This is the conflict the Board's new process sets forth.

The contention that Geske errs in "faulting" the court of appeals for having not proffered additional evidence at the ALJ hearing, Opp. at 9, fails to assess the magnitude of the evidence Geske did offer to show the presence of genuine issues of law and fact. That presentation included preparation of a Stipulation of Facts, three volumes of pleadings, and nine volumes of testimony for the ALJ. App. at 112a n.72. However, neither the ALJ nor the Board looked to establish any such genuine issues in its review of these materials as Geske had. The Board quotes a portion of this Court's decision in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 746 n.12, which refers to a respondent's responsibility to "come forward with *any* evidence." Opp. at 9. The responsibility to show genuine issues of law or fact is met when any portion of the libel turns on a "credibility issue" or "inferences to be drawn from undisputed facts." 461 U.S. at 746 n.12. The ALJ decision is replete with such references.

Finally. the Board contends the libel and slander per quod claims in Geske's Fourth Amended Complaint are beyond the Court's review. Opp. at 9 n.6. That pleading is a part of the judicial record here by the Seventh Circuit's grant of judicial notice to the pleadings from the companion case into this one, *Geske &*

Sons, Inc. v. Zipp, 154a, over the Board's objection. *See* Pet. at 18 n.15. Moreover, the Board based its decision on the Third Amended Complaint, 118a, and not the Fourth. The point highlights the fact that if the Board does not await the outcome of the state suit at the summary judgment stage, the parties remain obligated to proceed to judgment in the state court and to comply with pretrial rulings to narrow pleadings. That the Board cannot keep up with advancements in the state court corroborates the danger of premature Board interference.

The Board's failure to consider the constitutional right of access to the courts is another reason to grant Geske's petition. Nowhere in the opposition or the Board's decision is there a reference to its federal "usurpation" of this fundamental right at all. *See Printz v. United States*, No. 95-1478, 1997 U.S. LEXIS 4044 at 14, 17 (June 27, 1997). Because of *Geske & Sons, Inc.*, the Board may easily infringe on First Amendment rights and "separate state sovereignty" by preempting employer lawsuits, forcing the conduct of hearings, issuing bad state law rulings, *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237 (6th Cir. 1995), and making evidentiary evaluations as it sees fit, without preserving the state right to resolve the merits.[3]

II.

THE BOARD HAS STRETCHED THE CASELAW TO CONVEY SPECIFIC SECTION 7 PROTECTION AND REMEDIAL RIGHTS TO NON-CERTIFIED LABOR ORGANIZATIONS.

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[3]The "spin" placed on the state court proceedings is clearly evidenced. The ALJ discounted Geske's success in obtaining a temporary restraining order as evidence of no merit, whereas the speculation of counsel in papers filed before the appellate courts as to the prospect of the case, is. 111a. She also found that there was no libel (the state courts have yet to decide) despite the existence of admitted untruthful statements that union agents misled Geske's customers. 57a. And, the ALJ resolved credibility issues to determine that the message Local 150 was sending was not trade libel. The Board is entitled to no judicial deference when it interprets provisions of any statute but the NLRA. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The opposition highlights the very specific conflict between the Circuits arising from the Board's quiet change of the attorneys' fee standard. While the Board contends that the conflict between the Sixth and Seventh Circuits on the issue of an award to a non-certified labor organization does not merit review, Opp. at 10, it distinguishes the award in *Bill Johnson's Restaurants, Inc.*, to *employees* as reflecting the facts in the case. This interpretation accepts the Seventh Circuits' observation that the Court's repeated statements of concern for protecting employees in *Bill Johnson's Restaurants, Inc.*, did not prohibit awards to labor unions by negative implication. Opp. at 10. The citation does not support the inference relied upon by the Board as the Court resolved it in *Lechmere, Inc.*, 502 U.S. 527 (1992)

The self-organization right of employees to learn about the ability to organize "only" extends rights to nonemployee organizers, when the employees are inaccessible. 502 U.S. at 538 The Court did not confer direct "derivative rights" on these nonemployee unions as the Board contends. Opp. at 11. Rather, there is "a distinction 'of substance' between the union activities of employees and nonemployees." *Lechmere, Inc.*, 502 U.S. at 537." That distinction is not available to cloak nonemployee organizers with Section 7 rights. In *Lechmere, Inc*, the Board "was not permitted to engage in that balancing" of rights between the two groups. The Court was clear that no restriction on employee self-organization may be placed on employees by an employer, while "'*no such obligation is owed nonemployee organizers.*'" *Id.* at 533 (*quoting Babcock & Wilcox*, 351 U.S. 105, 113 (1956)) (emphasis added).

The Board's statement that the union's derivative rights "support a limited award of fees" treats the nonemployee organizers as if they were "employees" with Section 7 rights. Opp. at 11. That objective is contrary to the language of Section 7 and effectuates no policy described by the Act any more than giving the right of entry onto employer property to non-employee organizers would have. In both cases, the union assumes liability as an ordinary corporate citizen for the responsibility of organizing. It would be anomalous for the *Lechmere, Inc.* Court to reject the Board's argument that learning the advantages of self-organization overcomes the tort of

trespass and remedial attorneys' fees, while now permitting that same purpose to overcome the employer's tort of libel and incur attorneys' fees.[4]

In fact, in *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 747 (emphasis added), the Court showed that the award of fees was appropriate if the employer's lawsuit "had been filed for the exercise of the *employee's* Section 7 rights." The Board's extension of the Court's rule to include *non-employee* organizers' derivative rights cannot be supported by the Court's language. It is also not supported by the Board's previous position to the Court in *Breininger v. Sheet Metal Workers International Union*, 493 U.S. 67, 73-74 (1989), where it described Section 7 as a statutory restraint even on certified bargaining representatives. That position on the union's obligation to assume a duty of fair representation could only be possible if the union possessed no original statutory rights.

The General Counsel also quarrels with the discrete Circuit conflict in the power to assess fees and costs in favor of a labor organization where it is or is not a certified bargaining representative. The Sixth Circuit in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), could not have been more clear in its decision that the Board had no such authority when the union was not the employee representative.

As *amicus curiae* Associated Builders and Contractors, Inc. points out, Br. at 8, the Board's decision imposes a harsh restraint on the exercise of the constitutional right of access. It demonstrates the extraordinary consequences to the economic health of employers if attempting to protect their non-preempted rights in state court causes them to be responsible, not from fees under the "good faith"

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[4]Thirty years ago in *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63 (1966), the Court stated that "[a]fter all, the labor movement has grown up and must assume ordinary responsibilities...and unions should adopt procedures calculated to prevent such abuses." The Board has not been concerned with the defamatory quality of Local 150's statements towards Geske because it "has no relevance to the Board's function." *Id.* The issue would be considered by the state court under Restatement (Second) of Torts § 580B.

provisions of the American Rule (unsettled law and corresponding Rule 11-like obligations of counsel), but under interlocutory threat of certain imposition of fees and costs from the Board. Br. at 2.

The defining example of where the Board has now gone, is the contention that it has established a "different standard for the award of attorneys' fees and costs," between "patently frivolous" cases and to "compensate a party." Opp. at 12 n.8. The former situation it states ensures speedy access and discourages frivolous litigation; the latter is imposed for baseless and retaliatory state litigation. The remedies allegedly serve "distinct purposes" for each situation. Why and under what authority cases have been "subsequently overruled by the Board" that would provide the basis for granting fees to labor unions under this "standard," such as overturning *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988), is not explained in any decision. Opp. at 13 n.5. The alleged distinction is not meritorious.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Gerard C. Smetana*
LAW OFFICES OF
GERARD C. SMETANA
38 South La Salle Street, Suite 1218
Chicago, Illinois 60603
(312) 357-0250

Michael E. Avakian
CENTER ON NATIONAL LABOR
POLICY, INC.
5211 Port Royal Road, Suite 103
North Springfield, VA 22151
(703) 321-9180

Dated: July 23, 1997 *Attorney of Record for Petitioner